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No. 58072-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DEMAR RHOME,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. THE TRIAL COURT ERRED AND DEPRIVED MR. RHOME OF DUE PROCESS BY FINDING HIM COMPETENT TO STAND TRIAL

The Due Process Clause of the Fourteenth Amendment prohibits the conviction of a person who is not competent to stand trial. Drope v. Missouri, 420 U.S. 162, 171, 95 S.Ct. 896, 43 L. Ed. 2d 103 (1975); Pate v. Robinson, 383 U.S. 375, 378, 86 S.Ct. 836, 15 L. Ed. 2d 815 (1966). A person is competent to stand trial only when he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and to assist in his defense with "a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L. Ed. 2d 824 (1960) (internal quotations omitted).

This standard is embodied in RCW 10.77.050, which provides "[n]o incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050; In re the Personal Restraint of Fleming, 142 Wn.2d 853, 861-62, 16 P.3d 610 (2001).

A trial court has a degree of discretion in determining an individual's competency. State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). However,

> [a] lawyer's opinion as to his client's competency and ability to assist in his own defense is a factor to which the trial court must give considerable weight in determining a defendants competency to stand trial.

State v. Hicks, 41 Wn.App. 303, 307, 704 P.2d 1206 (1985).

In the present case the trial court gave no weight nor consideration to Mr. Rhome's attorney position as to his client's competency. The State responds by imagining substance from silence fancifully claiming "there is no reason to believe the trial court did not do so in this case." Brief of Respondent at 15. The State's claim simply recognizes the obvious; the record is devoid of anything that indicates the court actually considered the views of defense counsel.

In fact, there is ample reason to believe the court did not consider much less weight the views of defense counsel. First, of course is the court's silence. But beyond that one need only look at the court's written formulaic written findings of fact, such as they are, which do not mention (1) any of the evidence presented other than the WSH report; (2) do not resolve the obvious factual

disputes;, and (3) do not mention nor give any insight to the weight the court afforded the opinion of Mr. Rhome's attorney. CP 83-84. In fact, the court's written findings provides "the state, the defendant, and defense counsel all speaking in favor of determination of competency," CP 83, a plainly incorrect statement in light of the lengthy hearing on competency and defense counsel's expressed views. The written findings illustrate the court wholly ignored the views of defense counsel rather than give them great weight. Not surprisingly, the State's ignores these findings in its response.

Even ignoring Dr. White's assessment of Mr. Rhome's ability to work with his attorneys, and focusing instead on Dr. Dunham's concession of the difficulty of working with Mr. Rhome, together with the "considerable weight" the court should have but failed to afford Mr. Peale's opinion, the evidence more than established Mr. Rhome's incompetence. Mr. Rhome did not understand his attorneys were there to assist him, nor did he possess the ability to rationally assist them in his defense. The trial court's finding that Mr. Rhome was competent is contrary to the evidence. The resulting conviction denied Mr. Rhome due process.

2. THE TRIAL COURT ERRED AND DEPRIVED MR. RHOME OF A FAIR TRIAL IN FAILING TO INSTRUCT THE JURY TO DISREGARD IMPROPERLY ELICITED BAD ACTS EVIDENCE

The first question asked of Seattle Police Detective Rolf Norton in redirect by the deputy prosecutor was:

> What did [Mr. Rhome's former girlfriend] give you in conversation with her, tell you anything the defendant had done to her that may have explained her anger towards him?

3/1/06 RP 85. The detective answered that the former girlfriend alleged Mr. Rhome "had choked her, hit her with a frying pan, and raped her." Id. at 86. The detective added the further allegation that Mr. Rhome had tried to make her work as a prostitute. Id.

After initially permitting the questioning, the trial court shortly thereafter questioned the deputy prosecutor as to why the evidence was relevant. 3/1/06 RP 90. Despite the agreement of both parties and the court that the questioning was improper, the court refused Mr. Rhome's request for a curative instruction. 3/1/06 RP 100. Instead, the court permitted the deputy prosecutor to "cure" the problem by asking the detective additional questions regarding the rape allegation, and producing evidence the Mr. Rhome may or may not have been charged with a crime. Mr. Rhome maintains on

appeal the court erred in refusing the requested instruction and in fact exacerbated the harm by "curing" the problem in the manner it did.

Despite the plain record that Mr. Rhome requested the instruction, 3/1/06 RP 100, the State now maintains RAP 2.5 precludes him from raising the issue on appeal because he did not request the instruction moments earlier in trial when the testimony was produced. Brief of Respondent at 22-23. The State further claims the trail court's remedy was sufficient. Brief of Respondent at 24. The State is wrong on both counts.

The State's claim of waiver completely ignores the trial record and the nature of the claimed error. The focus of the State's argument is on Mr. Rhome's failure to immediately object to the what the state admitted at trial was plainly improper evidence. Brief of Respondent at 23. But since all the parties and the court at trial agreed the evidence was improper, 3/1/06 RP 92, the question on appeal, and thus the focus of any waiver analysis must be on the requested remedy and not the concededly improper testimony.

Mr. Rhome requested the court instruct the jury to disregard the testimony. 3/1/06 RP 100. The court refused, concluding it would compound the prejudice to revisit the testimony in instructing

the jury to disregard it. Id. There can be no claim that Mr. Rhome waived this issue on appeal.

Where improper evidence is presented before the jury, the generally accepted remedy is to instruct the jury to disregard it. See K. Tegland, 5 Washington Practice, Evidence Law and Practice, §103.8. But here, despite Mr. Rhome's request for such an instruction the trial court refused. 3/1/06 RP 100. Instead the court arrived at a "remedy" which allowed the state to revisit the testimony, and simply ask the detective if any charges were filed. Nonetheless the State claims this supposed remedy was the best possible remedy available. Brief of Respondent at 24. The State claims the prosecutor's questions "cast doubt on the credibility of the allegations." Id.

There is simply no way to construe the record in that manner. The questioning as to whether charges were field led only to the ambiguous answer "not to my knowledge," and thus left open the possibility that charges had been filed. Moreover, this supposed remedy never told the jury to disregard the evidence or even to limit its consideration to some proper purpose. The jury was free to conclude that indeed the allegations were true and that Mr. Rhome had simply "gotten away with" rape and assault. Thus,

rather than cure the impropriety, the trial court's remedy at best did nothing and at worst compounded the prejudice.

The trial court's failure to remedy the prejudice or to limit the evidence's use as propensity evidence deprived Mr. Rhome of a fair trial.

B. CONCLUSION

For the reasons above and those in Mr. Rhome's previous brief, this Court should reverse his conviction.

Respectfully submitted this 22nd day of August, 2007.

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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. DEMAR RHONE, Appellant.	)))))))))	COA NO. 58072-8-I

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 22ND DAY OF AUGUST, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DEBORAH DWYER, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] DEMAR RHOME 838720 STAFFORD CREEK CC 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF AUGUST, 2007.

X_____

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